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No. 00-5250

In The

Supreme Court of the United States

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

1. After insisting for 19 pages that *Simmons v. South Carolina*, 512 U.S. 154 (1994), has no application to the present South Carolina capital sentencing scheme, the state adds that both defense counsel and the trial judge adequately informed the jury of petitioner's parole ineligibility in any event. Brief for Respondent at 38-42. The record shows otherwise.

According to the state, defense counsel's jury argument to the effect that petitioner would "die in prison" satisfied the due process requirement of *Simmons*. While "due process does not dictate that the judge herself, rather than defense counsel, provide the instruction," *Simmons, supra*, 512 U.S. at 174 (Ginsburg, J., concurring), the whole point of *Simmons* is that the jury must be informed that the defendant will be *ineligible for parole* if sentenced to life imprisonment. The *Simmons* plurality stated the rule as follows: "Because truthful information *of parole ineligibility* allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." 512 U.S. at 169 (emphasis added). Likewise, the concurring opinion of Justice O'Connor specified that "in such a case the defendant should be allowed to bring *his parole ineligibility* to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding to the State's showing of future dangerousness." *Id.* at 177 (emphasis added). In this case, however, the jury never heard *anyone* say that petitioner would be ineligible for parole. The reason is that when defense counsel asked permission to read to the jury the no-

parole provisions of S.C. Code Ann. § 16-3-20(A) (1999 Cum. Supp.), the state vigorously opposed the request and persuaded the trial judge to deny it. JA 165. In compliance with the judge's ruling, defense counsel thereafter made no reference to petitioner's parole ineligibility. Despite counsel's seemingly hyperbolic claims that his client would go to prison "for the rest of his life," we know that the jury noticed his (and the court's) failure to say anything about *parole*, because the jury inquired about it during the course of deliberations. This sequence of events disproves the state's claim (made for the first time in its merits brief in this Court) that defense counsel's jury argument was an adequate substitute for the parole ineligibility instruction to which *Simmons* entitled him.

For the same reasons, the record fails to support the state's assertion that the trial judge's instructions actually amounted to a *Simmons* charge. Apparently recognizing that the initial instruction that "life imprisonment means incarceration until the death of the offender" did not exclude the possibility of intervening parole release, the jury asked two questions about parole. In response, the judge gave a slightly weaker version of the same ambiguous instruction that had prompted the jury's parole questions in the first place,[1] and added a potentially misleading admonition not to consider "parole eligibility or ineligibility." JA 240. At the time, the prosecution

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[1] The court's initial instruction stated that "life imprisonment means incarceration until the death of the offender." JA 209. The supplemental instruction omitted the word "incarceration," and informed the jury only that "life imprisonment means until the death of the offender." JA 229.

understood full well that none of these instructions conveyed petitioner's statutory parole ineligibility to the jury. Indeed, that was the very reason why the state so energetically opposed petitioner's request to have the no-parole statute read to the jury. Although *Simmons* does not dictate *who* must inform the jury that the defendant can never be paroled, it clearly requires that *someone* must. In this case, as in *Simmons* itself, no one did.

2. Next, the state renews the only argument on which it relied in the trial court: that *Simmons* does not apply because the prosecution did not "argue" to the jury that petitioner's future dangerousness was a reason to sentence him to death. Brief for Respondent at 42-49. Having already discussed this contention in his opening brief, Brief for Petitioner at 25-34, petitioner has only a few observations to add here.

The state correctly notes that its formal pretrial notice regarding petitioner's alleged future dangerousness (a notice the state now deprecates as "boilerplate") was not given to the jury. Brief for Respondent at 46. However, the pretrial notice is significant because it shows that the state itself recognized that its penalty phase evidence included the nonstatutory factor of future dangerousness. This pretrial candor gave way to the present semantic hairsplitting only after the state had turned its attention to evading the due process rule of *Simmons*.

The state suggests that both the *Simmons* plurality opinion and Justice O'Connor's concurrence require some sort of explicit prosecution argument regarding future dangerousness. While *Simmons* itself did involve prosecution argument, the Court made clear that the *Simmons* right of rebuttal is also triggered by a "showing" of

future dangerousness. 512 U.S. at 169 ("truthful information of parole ineligibility allows the defendant to 'deny or explain' the *showing* of future dangerousness" (emphasis added)). Justice O'Connor's concurring opinion likewise recognized that "[w]hen the State seeks to *show* the defendant's future dangerousness . . . the defendant should be allowed to bring his parole ineligibility to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding *to the State's showing* of future dangerousness." *Id.* at 177 (emphasis added). Thus *Simmons* does not support the state's implicit claim that the state can show by evidence that the defendant will be dangerous unless executed, and yet eliminate the defendant's right to a no-parole instruction merely by refraining from hammering home its future dangerousness case in summation.

The state also misreads *Simmons* as holding that the state may withhold truthful information concerning a defendant's parole ineligibility while seeking to prove that he will remain dangerous *in prison*. Brief for Respondent at 43-44. The actual discussion of this point in the *Simmons* plurality opinion is as follows:

> Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff. But the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility.

512 U.S. at 165 n.5. Likewise, Justice O'Connor noted that whenever due process entitles a capital defendant to inform the jury of his parole ineligibility, "the prosecution is free to argue that the defendant would be dangerous in prison." *Id.* at 177. These passages make clear that proof of a defendant's likely misconduct in prison is a permissible prosecution *response* to the fact that he will be ineligible for parole, not a basis for withholding accurate parole information in the first instance.

CONCLUSION

For the foregoing reasons and those set forth in his opening brief, petitioner requests that the Court reverse the judgment of the South Carolina Supreme Court inso-far as it leaves undisturbed his sentence of death.

Respectfully submitted,

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